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No. 88-1840

In The

Supreme Court of the United States

October Term, 1988

ARTHUR VOELLINGER, for himself and as a class representative,

Petitioner,

vs.

THE POLICE RETIREMENT SYSTEM OF ST. LOUIS, et al., and THE CITY OF ST. LOUIS,

Respondents.

Petition For A Writ Of Certiorari To The Missouri Court Of Appeals, Eastern District

RESPONDENT'S BRIEF IN OPPOSITION

BUECHNER, MCCARTHY, LEONARD, KAEMMERER, OWEN & LADERMAN

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. May a state legislature adopt a police pension benefit increase prospectively only in order to comply with a state constitutional provision prohibiting an increase in benefits to state employees after the employee's service has terminated?

II. May a state legislature adopt a police pension benefit increase prospectively only for purposes of budgetary restraints?

III. May a state legislature adopt a police pension benefit increase prospectively only in order to both attract better recruits and retain experienced officers?

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PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

Petitioner's Statement of the Case fails to add that Petitioner had also filed an identical federal court action which was dismissed on March 17, 1989 without appeal. Appendix D also fails to attach a copy of the Proposed Findings of Fact and Conclusion of Law of the City of St. Louis which were adopted by the trial court. Both orders are reprinted in Appendices A and B hereto.

Petitioner Arthur Voellinger's Statement of the Case erroneously states that the instant action does not concern §86.366, RSMo 1986. "However, Petitioner's original intervention into this litigation was into Respondent-Plaintiff's Declaratory Judgment action seeking to interpret §86.366, which sought to pay already retired officers pension benefits equal to those paid to active officers under §86.253, RSMo 1986, the statute in question herein. Thus, by definition, Petitioner - Intervenor Voellinger claimed an interest in that litigation and statute. In fact, §86.366 was an attempt to repay the officers' lump sum contributions to the Retirement System as a pension benefit for "special advisors", provided that such payments could be made "without impairment of the funds for the purposes for which they were established. . . ." Section 86.366.1, RSMo Supp. 1984. This statute thus sought to avoid the two clear problems inherent with paying retired officers the same benefit in 1981 when §86.253 was passed into law: (1) "special advisors" provided an active service to the state in order to earn the benefit, avoiding Missouri's constitutional prohibition against the grant of benefits to retired employees; and (2) the legislature authorized the Board of Trustees to grant the benefit only when finances allowed, recognizing the System's budgetary constraints.

The trial court bifurcated the trial concerning §86.366 and §86.253 because the former could have made the latter moot. The trial court's finding after the initial trial that no benefits could be paid under §86.366 necessitated the hearing of Petitioner - Intervenor's 42 U.S.C. §1983 claim.

ARGUMENT

I.

MAY A STATE LEGISLATURE ADOPT A POLICE PENSION BENEFIT INCREASE PROSPECTIVELY ONLY IN ORDER TO COMPLY WITH A STATE CONSTITUTIONAL PROVISION PROHIBITING AN INCREASE IN BENEFITS TO STATE EMPLOYEES AFTER THE EMPLOYEE'S SERVICE HAS TERMINATED?

Petitioner's only ground for consideration governing review on certiorari could be that the state court "decided an important question of federal law which has not been, but should be, settled by this Court. . . ." Rule 17(1)(c). However, this Court, the federal courts and state courts have uniformly decided the exact issue underlying this Petition against Petitioner's interest.

This Court has held that the "rational basis" test applies when a party challenges alleged discriminatory classifications in a state's payment of employee retirement benefits. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 101 S. Ct. 453, 66 L.Ed. 2d 368 (1980). In *Fritz*, the court further held that "it is, of course, 'constitutionally irrelevant whether [the trial court's] reasoning in fact underlay the legislative decision . . . ' because this court has never insisted that a legislative body articulate its reasons for enacting a statute." *Id.* at 179 (cites omitted).

The case of *Muzquiz v. City of San Antonio*, 520 F.2d 993 (5th Cir. 1975), *on reh.* 528 F.2d 499 (1976), *vac.* 438 U.S. 901, 98 S.Ct. 3117, 57 L.Ed. 2d 1144 (1978); *affirmed on remand*, 586 F.2d 529 (1978), also involved a 42 U.S.C. §1983 equal protection argument concerning refund of pension contributions. The court held that a classification

in laws governing a retirement system "is deemed permissible if it is found to have a 'reasonable relationship' to a legitimate governmental interest". *Id.* at 1001. The court quoted from *McGowen v. Maryland,* 366 U.S. 420, 425-426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961) as follows:

> State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set *if any state of facts may be conceived to justify it.* [Emphasis added.]

Finally, *Hall v. Board of Trustees of Arkansas Public Retirement System,* 671 F.2d 269 (8th Cir. 1982) is directly on point. In *Hall,* the plaintiff, a former Arkansas deputy prosecuting attorney, brought a class action based on 42 U.S.C. §1983 against the state employees' pension system. His action alleged a violation of due process and equal protection arising out of a state law governing the refund of employees' lump sum contributions to that system. The Arkansas law under scrutiny provided for refund of lump sum contributions without interest to employees with less than five (5) years service while it allowed 3% interest to employees with five (5) years or more service. Citing to the rationale set out by the court in *Fritz,* the court in *Hall* affirmed the district court's dismissal of the action. 671 F.2d at 271.

Article III, §39(3), Mo. Const. prohibits the payment of "extra compensation" to retired state employees. The trial court found that this provided a rational basis for the classification in §86.253.4 because the retirement benefit in question would be "extra compensation" to retired police officers. Petitioner attempts to characterize this increase in benefits as the one and only return of the

police officer's 7% of salary contributions to the Retirement System. However, the testimony of the witnesses, except for Petitioner's actuary, made it clear that the police officers' contributions have always been returned to those officers, before and after §86.253 became effective, in the form of their "service retirement allowance." *See* §86.253.1, RSMo 1986. For example, at the time of trial, Petitioner Voellinger had received over Ninety One Thousand Dollars ($91,000.00) from the Retirement System. The first $11,458.03 of those payments to Mr. Voellinger were tax-free because they represented a return of his contributions to the System. Moreover, had he passed away before receiving an amount equal to his contributions, the remaining amount would have gone to his beneficiary or estate. *See* §86.293, RSMo 1986.

The simple fact is that Petitioner Voellinger received back his "earned contributions" to the System. Section 86.253.4 was a way to increase the retirement benefits of future police officers who reached the age fifty-five or who attained twenty years experience. It is for this reason that §86.253.4 uses the term "repaid" in reference to the officer's contributions, because the statutes have always provided that those contributions be paid in the form of a retirement allowance under §86.253.1 or death benefit under §86.293.

For these reasons, the lower courts did not err in ruling that Article III, §39, Mo. Const. provides a rational basis for the benefits under §86.253.4 to be paid only from its effective date hence.

II.

MAY A STATE LEGISLATURE ADOPT A POLICE PENSION BENEFIT INCREASE PROSPECTIVELY ONLY FOR PURPOSES OF BUDGETARY RESTRAINTS?

Petitioner's argument that there was no evidence to support a finding that budgetary constraints formed a rational basis for the pre-1981 and post-1981 classification is contrary to the overwhelming evidence. The trial court heard evidence that the legislature was presented with an actuarial study showing the cost of §86.253.4. Petitioner's assertion that the legislature must specifically have had a financial impact study for making the benefit applicable to then-retired officers is specious. The legislature had the yearly cost impact for active officers and could easily assume the cost to all retired officers then existing would far exceed that yearly cost. The trial court had evidence that the cost would have been far greater than a full year's budget, which would be impossible for the City of St. Louis to fund without impairment of the System's funds.

In any case, the law allows the reviewing court to uphold the legislative classification in pension benefits "if any set of facts may be conceived to justify it." *Langston v. Levitt*, 425 F.Supp 642 (S.D. N.Y. 1977) (quoting from *McGowen v. Maryland, supra*, 366 U.S. 420, 425-426). Thus, the court need not even agree with the legislature's reasoning as long as it can find a rational basis to support the legislation.

Finally, Petitioner's rendition of the evidence to theorize that the System had an "unfunded accrued liability"

in 1981 is totally contrary to the uncontroverted testimony at trial. It was refuted in both the initial stage of the bifurcated trial concerning §86.366 and the second stage concerning §86.253.4.

III.

MAY A STATE LEGISLATURE ADOPT A POLICE PENSION BENEFIT INCREASE PROSPECTIVELY ONLY IN ORDER TO BOTH ATTRACT BETTER RECRUITS AND RETAIN EXPERIENCED OFFICERS?

The fact that the reviewing court can uphold the challenged legislation by a de novo review and search for any conceivable reasoning for the legislation allows this court to look beyond the lower court's reasoning. In the instant case, one may assume that the Missouri General Assembly enacted §86.253.4 in order to attract a better police officer recruit by enhancing the retirement benefit package. An officer may join the force at a young age, retire after twenty years or at the age of fifty-five, and start anew with a lump sum repayment of his or her contributions.

The legislature may also have passed the legislation in order to retain experienced officers by giving them a bonus for staying on the force twenty years or until the age of fifty-five. *See*, §86.253.4. The legislature would not enhance either of the above goals by making the benefit in question available to the Petitioner and his class of retired police officers.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ARTHUR VOELLINGER, for himself and as a class representative, Plaintiff,	)	Cause No. 85-238-C (4)
v.	)	
HOMER A. SAYAD, et al., Defendants.	)	

ORDER
(Filed Mar 17, 1989)

This suit was filed in this Court in 1985 and has been held in abeyance awaiting a decision from the courts of the State of Missouri on the identical questions of law.

The matter was heard in the trial court of the City of St. Louis, State of Missouri, where a decision adverse to the interests of the plaintiff was entered. Subsequently, the Missouri Court of Appeals affirmed the trial court on November 29, 1988, and denied rehearing and transfer to the Missouri Supreme Court on January 4, 1989, and the application to transfer was denied on February 14, 1989. *See The Police Retirement System of St. Louis v. The City of St. Louis, et al.*, 763 S.W.2d 298 (Mo. App. 1988).

This Court had earlier expressed its belief that the substantive issues concerned the constitutionality of Missouri statutes relevant to the status and benefits of retired police officers from the City of St. Louis, Missouri.

Therefore, comity and judicial economy made it appropriate for the judiciary of Missouri to make the initial decision in this matter. The Missouri courts have refused to declare the pertinent statutes unconstitutional and have ruled adversely to the plaintiff in all other material aspects of this cause.

Accordingly, the Court dismisses this suit on several grounds, including collateral estoppel. The plaintiff is not, of course, precluded from seeking appellate or ancillary review of this order in an appropriate federal court.

Plaintiff's complaint is dismissed.

SO ORDERED.

Dated this 17th day of March, 1989.

/s/ Clyde S. Cahill
Clyde S. Cahill
United States District Judge

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(ST. LOUIS CITY)

THE POLICE RETIREMENT SYSTEM OF ST. LOUIS, et al., Plaintiffs, vs. THE CITY OF ST. LOUIS, et al., Defendants, and ARTHUR VOELLINGER, for himself and as a class representative, Defendant and Third-Party Plaintiff.	Cause No. 844-00333 Division No. 3

PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW
(Filed Nov 2, 1987)

FINDINGS OF FACT

1. Intervenor/Third-Party Plaintiff Voellinger represents a class of individuals (or their surviving heirs at law) who retired from the Metropolitan St. Louis Police Department prior to September 28, 1981 and who were still living on that date.

2. Plaintiff Police Retirement system of St. Louis is an entity created pursuant to §86.200 et. seq, R.S.Mo., which administers and pays various retirement benefits

to retired members of the Metropolitan St. Louis Police Department.

3. Defendant City of St. Louis is a constitutional charter city of the State of Missouri.

4. Intervenor seeks declaratory relief and damages against Plaintiff and Defendant under 42 U.S.C. §1983 arising out of the enactment of §86.253 R.S.Mo., effective September 28, 1981. Under the terms of that statute, members of the Metropolitan St. Louis Police Department who retired after the effective date of the Act are entitled to a lump-sum refund of their contributions to the Police Retirement System upon retirement. No similar provision is made under the Act for former members of the Metropolitan St. Louis Police Department who, like Intervenor Voellinger, retired prior to the effective date of the Act, September 28, 1981.

5. In his Petition, Intervenor alleges that Plaintiff and Defendant have violated Intervenor's right to Equal Protection of the Laws by complying with §86.253 viz: paying lump sum contributions to post-September 28, 1981 retirees while not paying such to pre-September 28, 1981 retirees.

CONCLUSIONS OF LAW

6. The Equal Protection Clause prohibits invidious discrimination. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). In the area of economic legislation, such as that dealing with pension systems, a difference in treatment will be upheld if supported by a rational basis.

Dandridge v. Williams, 397 U.S. 471, 485-6 (1970); *U.S. Railroad Ret. Bd. v. Fritz*, 449 U.S. 166, 174-176 (1980).

7. There is a rational basis for providing a benefit, i.e., refund of lump sum contributions, to people performing services (post-September 28, 1981 retirees) while denying that benefit to those not performing such services (pre-September 28, 1981 retirees). The rational basis is to be found in the provision of Mo.Const. Art. III, §39(3), prohibiting the grant of additional compensation after services have been rendered. Other courts, faced with an equal protection challenge to legislation or policies which distinguish between past service and current or future service, have uniformly upheld the validity of such acts or policies. See, e.g., *Musser v. Monton*, 639 F.2d 309 (6th Cir. 1981); *Marsh v. Gov't. of the Virgin Islands*, 431 F.Supp. 800 (Div. 1, 1977); *Hall v. Bd. of Trustees of Arkansas Public Employees Ret. System*, 671 F.2d 269 (8th Cir. 1982), cert. denied 103 S.Ct. 52.

It is therefore Ordered, Adjudged and Decreed, that Judgment be entered in favor of Plaintiffs and Defendants and against Intervenor on Intervenor's claim for damages;

It is further Ordered, Adjudged and Decreed that the provisions of §86.253 R.S.Mo. are valid and not in violation of Intervenor's right to equal protection in that a rational basis exists to differentiate between pre and post September 28, 1981 trustees.

_____

Judge

Dated:

_____